**LEE CHOO TAI & ANOR.**

**v.**

**TOU TENG CHUNG**

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
HARUN HASHIM SCJ
MOHD. YUSOFF MOHAMED SCJ
[CIVIL APPEAL NO. 438 OF 1988]
1 AUGUST 1989

***TORT:*** *Plaintiff met with an accident on 31 March 1983 at 10 a.m. - 1st medical report states injuries at time of admission to Lumut District Hospital on 1 April 1983 at 12.30 a.m. - Plaintiff refused admission into hospital and discharged himself - Plaintiff visited Lumut Hospital on 17 April 1984 with history of a fall - X-ray taken shows no fracture - On 23 June 1984 plaintiff examined by another doctor at General Hospital, Ipoh - 2nd medical report from Ipoh General Hospital states fractures and disabilities - Whether fractures and disabilities caused by particular accident on 31 March 1983 - Awards on general and special damages - Whether supported by sufficient evidence.*

***CIVIL LAW ACT:*** *Damages - Loss of earnings - Whether evidence to support that plaintiff was incapacitated resulting from the accident.*

This was an appeal by the defendant on quantum only, arising from an award by the High Court, Ipoh in respect of a motor accident on 31 March 1983. The issue was whether the injuries, being fractures and disabilities, suffered by the plaintiff was caused by the particular accident on 31 March 1983 or by another accident. The main ground of appeal is that these awards are not supported by sufficient evidence.

**Held:**

**[1]** The respondent's only injuries, resulting from the accident which occurred on 31 March 1983 were as found by Dr. Sadandan of District Hospital, Lumut. Considering the evidence as a whole, the respondent's other injuries were not the result of the accident of 31 March 1983.

**[2]** The learned Judge in this appeal had misapprehended the facts in his assessment of the damages and therefore the sums awarded were erroneous and the award was varied from RM20,000 to RM750 on general damages for the injuries.

**[3]** As there was no evidence to support the respondent's contention that he was incapacitated resulting from the accident there will be no order as to loss of income nor prospective loss of earnings.

*[Appeal allowed with costs.]*

**Cases referred to:**
*Topaiwah v. Salleh [1968] 1 MLJ 284*
*Tan Kuan Yau v. Suhindrimani [1985] CLJ (Rep) 323*
*Parvathy & Ors. v. Liew Yoke Khoon [1984] MLJ 183*

**Other source referred to:**
*Halsbury's* 4th Edn., Vol. 12

*For the appellants - R.K. Nathan, (Ng Poh Tat with him), M/s. Henry Lim & Co.*
*For the respondent - R. Jegatheesa; M/s. R.J. Esa & Co.*

**JUDGMENT**

**Mohd. Yusoff Mohamed SCJ:**

This is an appeal on quantum only arising from an award by the High Court at Ipoh on a motor accident.

There is no judgment written by the learned Judge to see how he arrived at his decision in making the award. From the award we can clearly construe that he had acceded to the plaintiff's Counsel's submission in allowing damages for the various items asked for in his submission.

For general damages the learned Judge allowed a sum of RM20,000 consisting of:

(1) deformed left clavicle;

(2) deformed second rib;

(3) deformed right tibia (upper 1/3); and

(4) deformed right ankle.

The learned Judge also allowed special damages at RM777.40 and loss of earning at RM20,000. For prospective loss of income to the plaintiff he awarded a sum of RM74,800 calculated on the basis of an income of RM750 per month for eleven years purchase.

The main ground of appeal is that these awards are not supported by sufficient evidence.

What is the evidence? The respondent/plaintiff was riding his motor-cycle on 31 March 1983 at about 10 p.m. along Ayer Tawar Road, Perak. He was travelling towards Pantai Remis. The 2nd appellant/defendant was driving a motor-lorry travelling in the same direction when the collision suddenly occurred. The 1st appellant/defendant was the owner of the lorry.

At 10.15 p.m., 15 minutes later, respondent lodged a police report at Ayer Tawar Police Station stating that resulting from the collision he fell and immediately got up and went to the police station. He also stated in his report that the injuries he suffered at the time were bleeding on the right eyebrow and his right hand, and that his motor-cycle was damaged.

At 12.30 a.m. on 1 April 1983, about 2 hours later, he was seen by Dr. Sadandan at Lumut Hospital. The doctor's report states that at the time of admission the respondent had not lost his consciousness, and his injuries were:

> Laceration right cheek, right eyebrow; Abrasions right forearm and both legs; Tenderness over left clavicle.

The doctor also reported that the respondent had refused admission into hospital and had discharged himself. In his evidence the doctor said that the respondent had visited the hospital again after 17 April 1984, with a history of a fall. An X-ray of the respondent's injuries was taken on that date by the same doctor and he found that there was no fracture seen on the respondent.

On 23 June 1984, the respondent was examined by another doctor, Dr. Taam Shik Suen, at Ipoh General Hospital. From his report dated 13 September 1984, he states that the respondent had the following disabilities:

> Left clavicle deformed at the medical end (clinically healed);
> Tibia (right leg upper 1/3) deformed;
> Right ankle deformed (clinically old fracture).

In his evidence, Dr. Taam said that it was possible those disabilities he found on the respondent might have been caused by another accident and he could not say whether the fractures were caused by the particular accident (occurred on 31 March 1983).

The respondent on the other hand maintained in his evidence that he was unconscious upon impact of the collision with the appellant's motor-lorry and that he regained his consciousness only at the Ipoh General Hospital. He said that his wife lodged the report at Ayer Tawar Police Station and not him. He also said that after the accident, his wife took him to Lumut Hospital and then to General Hospital, Ipoh, where he later regained his consciousness and lodged a police report there. (Police report not in the record).

The respondent also said that he was hospitalised at Ipoh General Hospital for 4 months and thereafter attended the hospital as an outpatient three times a week for a period of one year. (It is also unfortunate that there is no record on these.)

In view of these conflicting evidence, we appreciate that the learned Judge faced some difficulty to make a proper finding of fact. But having regards to the doctors' evidence and assisted by the medical reports we are of the opinion that the respondent has not told the truth.

We accept the evidence of Dr. Sadandan that the respondent was fully conscious almost immediately after the collision, when the respondent was examined by him. We also accept that the respondent's only injuries, resulting from the accident occurred on 31 March 1983, were as found by Dr. Sadandan and these were:

> Laceration of the right cheek and eye-brow, and abrasions of his right forearm and legs.

Considering the evidence as a whole, we are of the opinion that the respondent's other injuries were not the result of the accident of 31 March 1983.

Generally, the Court of appeal will not, however, vary the award made by a trial Judge unless it is satisfied that the learned Judge acted upon some wrong principle of law or misapprehended the facts or that the sum awarded was a wholly erroneous estimate. Thus it is not sufficient that the Court of appeal would itself have awarded a different sum if it had been sitting as the Court of first instance - *Halsbury's* 4th Edn., Vol. 12. This principle has been held throughout by our Federal and Supreme Courts - see *Topaiwah v. Salleh* [1968] 1 MLJ 284; *Tan Kuan Yau v. Suhindrimani* [1985] CLJ (Rep) 323.

Now in this appeal we are of the view that the learned Judge had misapprehended the facts in his assessment of the damages and therefore the sums awarded were erroneous.

In these circumstances, we allow this appeal and vary the award made by the learned Judge as follows:

**General Damages:**

RM750 for lacerations and abrasions to the right cheek and right forearm and leg. (*Parvathy & Ors. v. Liew Yoke Khoon* [1984] MLJ 183 followed).
Interest at 8% from date of service of summons.

**Special Damages:**

RM777 as agreed, with 4% interest from date of accident.

There is no evidence to support the respondent's contention that he was incapacitated resulting from the accident. In this respect there will be no order as to loss of income nor prospective loss of earnings.

Costs to appellant to be taxed and deposit is to the account for costs.

Also found at [1989] 2 CLJ 384